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INSIDE

Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

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- Renewable Energy and Energy Efficiency Program

Bankruptcy reform and family farmers

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 passed the Senate on March 10; it passed the House of Representatives on April 11; and it was signed by the President on April 20, 2005. It became Public Law No. 109-8, marking the conclusion of almost a decade of contentious debate. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (to be codified in scattered sections of 11 U.S.C.). Most provisions of the bill will not be effective for six months from enactment. *Id*. at § 1501, 119 Stat. at 216.

Much of the new law is directed toward consumer bankruptcy reform, and some of the most controversial aspects of it, e.g., means testing for Chapter 7 relief, have been reported widely in the media. The important aspects of the law that will directly affect farmers, however, have received little attention. The main provisions are summarized as follows.

Chapter 12 becomes permanent. When Chapter 12 was first enacted in 1986, it was a temporary provision of the Bankruptcy Code. *Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986*, Pub. L. No. 99-554, tit. II, § 255, 100 Stat. 3088, 3105-3113 (1986) (codified at 11 U.S.C. §§ 1201 - 1231). It had a sunset provision that provided for repeal on October 1, 1993. *Id*. at tit. III, § 302(f), 100 Stat. at 3124. It has been renewed numerous times, each time as another temporary extension. Renewals, however, sometimes came months after Chapter 12 had sunset, creating frustrating gaps in its availability. Efforts to make Chapter 12 permanent were politically tied to the bankruptcy reform legislation, as proponents sought the votes of farm state representatives. Therefore, the various versions of bankruptcy reform over the years have generally included a provision that would make Chapter 12 a permanent part of the Bankruptcy Code. Section 1001 of the new law so provides. *Id*. at § 1001, 119 Stat. at 185-86. This amendment will take effect on July 1, 2005, the date upon which the current extension of Chapter 12 would have otherwise expired. *Id*.

Chapter 12 eligibility expanded. The new law amends Chapter 12 eligibility standards, expanding its availability. Four changes are made. First, the statutory maximum for debts is increased from $1,500,000 to $3,237,000. *Id*. at § 1004, 119 Stat. at 186. This maximum amount will now increase with the Consumer Price Index. *Id*. at § 1002, 119 Stat. at 18.

Second, the new law amends the requirement that at least eighty percent of debt come from farming. Under the new law, just fifty percent of the debt must arise out

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Federal Register summary: April 2 to May 13, 2005

BRUCELLOSIS. The APHIS has issued interim regulations that change the classification of Florida to brucellosis-free. **70 Fed. Reg. 22588 (May 2, 2005)**.

FOOD SAFETY. The (FSIS) is soliciting proposals for cooperative agreement projects to be funded in fiscal year 2005. Proposals should be made in one or more of the following cooperative agreement program areas: (1) food animal production, transportation, and marketing; (2) small and very small inspected meat, poultry, or egg product establishments; (3) retail stores, food service establishments, and other inspection-exempt small businesses processing or handling meat, poultry, and egg products; (4) applications of new technologies that will permit small and very small meat, poultry, and egg product establishments to produce safer products; and (5) enhancement of laboratory testing capability of the Food Emergency Response Network for microbiological threat agents. **70 Fed. Reg. 20517 (April 20, 2005).**

GENETICALLY MODIFIED ORGANISMS. The APHIS has adopted as final regulations that require permits for the introduction of plants genetically engineered for the production of compounds for industrial use. **70 Fed. Reg. 23009 (May 4, 2005)**.

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of the farming operation. *Id*. at § 1004, 119 Stat. at 186.

Third, the income requirement that provided that fifty percent of income from the preceding taxable year must come from farming is expanded to allow for a consideration of either the taxable year preceding the bankruptcy or each of the second and third years preceding. *Id*. at § 1005, 119 Stat. at 186-87.

Fourth, family fisherman are defined and afforded Chapter 12 eligibility, subject generally to the pre-reform income and debt standards. *Id*. at § 1007, 119 Stat. at 187-88. Although maximum aggregate debts are set at $1,500,000.00, this amount will be indexed. *Id*. at § 1202, 119 Stat. at 193.

Priority of certain tax obligations modified. Under the new law, claims owed to any government unit as a result the disposition of a farm asset may no longer be afforded § 507 priority. Provided that the debtor receives a discharge, these claims can be treated as unsecured debt. *Id*. at § 1003, 119 Stat. at 186.; *see*, Neil E. Harl, Joseph E. Peiffer, and Roger McEowen, *Major Developments in Chapter 12 Bankruptcy*, 16 Agricultural Law Digest 57 (Apr. 22, 2005). This provision took effect on the date of the enactment, but will not apply with respect to cases commenced before that date. *Id*. at § 1003(c), 119 Stat. at 186.

The retroactive assessment of disposable income is prohibited. In the past, courts have interpreted the Chapter 12 "projected disposable income" requirement as allowing an unsecured creditor or the trustee to object to discharge on the grounds that all "actual" disposable income had not been paid to unsecured creditors, even though the projected amount was paid. *See, e.g.*, *Rowley v. Yarnall*, 22 F.3d 190 (8th Cir. 1994). This objection forced farm debtors to go back and account for all income and expenses throughout the plan term, running the risk of being assessed a final amount due in order to receive a discharge. Moreover, it frequently prohibited farmers from having liquid assets remaining that could be carried over to keep the farm operating after discharge.

Section 1006 of the new law, "Prohibition of retroactive assessment of disposable income," reaffirms the requirement that a Chapter 12 plan can be confirmed based on "projected" disposable income. It then provides specific rules for how this obligation can be modified, providing that modification can only apply prospectively, i.e., it cannot increase the amount of payments that were due prior to the date of the order modifying the plan. Unless the debtor proposes modification, an increase may not require payments to unsecured creditors in any particular month that are greater than the debtor's disposable income for that month. And, a modification of the plan in the last year of the plan cannot require payments that would leave the debtor with "insufficient funds to carry on the farming operation after the plan is completed." *Id*. at § 1006, 119 Stat. at 187.

Summaries of the overall bankruptcy reform bill are available on the American Bankruptcy Institute website, http://abiworld.net/bankbill/ and from Congress at its Thomas website, http://thomas.loc.gov/. Careful analysis of the entire bill will be required in order to determine how the general provisions such as means testing, homestead exemption limitations and required credit counseling will apply in the context of farm bankruptcy.

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ORGANIC FOODS. The USDA has announced that six positions are open on the National Organic Standards Board (NOSB): organic producer (2 positions), consumer/public interest (3 positions), and USDA accredited certifying agent (1 position). The Secretary will make the appointments for the 5-year terms. Nominations should be sent to Ms. Katherine E. Benham, Advisory Board Specialist, USDA-AMS-TMP-NOP, 1400 Independence Avenue, SW., Room 4008-So., Ag Stop 0268, Washington, D.C. 20250. **70 Fed. Reg. 20346 (April 19, 2005)**.

CROP RISK MANAGEMENT. The FCIC, through the Risk Management Agency, has announced the availability of approximately $5 million in fiscal year 2005 for collaborative outreach and assistance programs for women, limited resource, socially disadvantaged and other traditionally under-served farmers and ranchers, who produce priority commodities. **70 Fed. Reg. 23963 (May 6, 2005).**

The FCIC, through the Risk Management Agency, has announced the availability of approximately $4 million in fiscal year 2005 for Risk Management Research Partnerships for the development of non-insurance risk management tools that can be utilized by agricultural producers to assist them in mitigating the risks inherent in agricultural production. **70 Fed. Reg. 23969 (May 6, 2005).**

TOBACCO. The CCC has adopted as final regulations governing the Tobacco Transition Payment Program enacted by Title VI of the American Jobs Creation Act of 2004, ending the tobacco marketing quota and price support loan programs. The TTPP will provide payments over a ten-year period to quota holders and producers of quota tobacco to help them make the transition from the federally-regulated program. The final regulations also remove obsolete tobacco program provisions at 7 CFR parts 723 and 1464. **70 Fed. Reg. 17149 (April 4, 2005)**.

TUBERCULOSIS. The APHIS has issued interim regulations which change the designation of California from modified accredited advance to accredited free under the cattle and bison tuberculosis regulations. **70 Fed. Reg. 19877 (April 15, 2005)**.

WITHHOLDING TAXES. The IRS has issued proposed regulations that provide guidance for employers and employees with regard to Form W-4, Employee's Withholding Allowance Certificate. Guidance is provided concerning the submission of copies of certain withholding exemption certificates to the IRS, IRS notification to employers and employees of the maximum number of withholding exemptions permitted and the use of substitute

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Recreational use statutes and E. coli contamination

In *Kautz v. Ozaukee County Agricultural Society*, 688 N.W.2d 771 (Wis. Ct. App. 2004), the plaintiff was a two year old child who accompanied parents to a county fair organized and operated by the defendant. While at the fair, the plaintiff spent much of the time in a backpack carried by the parent. However, when the parent visited the lawn tractor displays, the plaintiff was allowed to climb on the tractors. The parent was an employee of a manufacturer of lawn tractors and was visiting the fair, in part, to see what products were being offered by competitors. After visiting the tractors, the plaintiff had an ice cream cone, although the parent wiped the child's hands before the child ate the ice cream cone. The plaintiff suffered E. coli poisoning and was hospitalized.

The plaintiff, through, the parent, sued the defendant for failure to control the animal waste at the fair, which the plaintiff claimed was carried to the lawn tractors by employees and other fair attendees from the animal barns. The defendant pled immunity from the suit under the Wisconsin Recreational Use statute, Wis. Stat. § 895.52. The plaintiff argued that the recreational use statute did not apply because the injury was caused from the condition of the lawn equipment and not a condition of the land. The plaintiff argued that the term "property" in the statute referred only to the real property and not to movable property such as the lawn tractors.

The court held that the recreational use statute did apply to the cause of action because the focus of the negligence claim was on the defendant's improper control of animal waste on the property and not the negligent handling of the lawn tractors.

The plaintiff also argued that the recreational use statute did not apply because the parent's main purpose in visiting the fair was not recreational but was related to the parent's business. The court reviewed past cases where plaintiffs had recreational and nonrecreational purposes for being on the property and noted that where a recreational use was made of the property, even though the main purpose was nonrecreational, the recreation use statute applied to injuries sustained during the recreational use. The court held that, because the plaintiff child made use of the recreational aspects of the county fair, the injuries suffered were excepted from liability of the defendant by the recreational use statute. The court went so far as to state "As long as one of the purposes for engaging in the activity is recreation, as it concededly was here, the statute attaches and bars their claim."

—Roger A. McEowen, reprinted by permission from 16 Agric. L. Dig. 22 (2005).

Drake to Offer Summer Ag Law Institute Classes

The Agricultural Law Center at Drake is offering five summer courses which are available for attorneys to take as CLE credit. Topics to be covered include the new Bankruptcy Reform Act as applied to farmers, rural development, food traceability, and tax and estate planning for farmers. The courses, instructors and dates for this year's institute are:

Estate Planning for Farmers - Prof. Roger McEowen, Iowa State, May 16 - 20
Taxation of Agricultural Businesses (Law 422), Prof. Jim Monroe, Drake - June 6 - 9th
Agricultural Bankruptcy, Prof Susan A. Schneider, Graduate Program in Agricultural Law, Univ. of Arkansas - June 13 - 160
Law and Rural Development, Prof. Neil D. Hamilton, Drake July 11 - 14
Traceability of Food and Agricultural Products, Prof. Michael Roberts, National Center for Agricultural Law, Univ. of Arkansas, July 18 - 21

The tuition for CLE credits (each seminar is 14 hours) is $400. To register please contact Prof. Neil Hamilton at neil.hamilton@drake.edu. For more information about the courses please visit the Drake web site at www.law.drake.edu.

GAO sees deficiencies in efforts to guard agriculture from terrorism

In October 1999, Dr. Floyd P. Horn, Administrator of the U.S. Department of Agriculture's Agricultural Research Service warned a U.S. Senate subcommittee about the vulnerability of American agriculture in a terrorist attack. Other experts have also emphasized the susceptibility of agriculture to a deliberate introduction of animal and plant pathogens at the farm level. Natural barriers that could slow pathogenic dissemination have been thwarted by the concentrated and intensive nature of modern farming practices with highly genetically homogeneous livestock and crops.

Livestock offer an especially attractive target. Terrorists can pick an economically valuable livestock, match the target against a published list of diseases, and select the most accessible pathogen. Many of these organisms are endemic outside the United States and can be isolated from common materials with very little training. And unlike the weapons of bioterrorism, lethal and highly contagious biological agents that affect animals usually do not harm humans.

In fact, experts suggest that the economy, not human health, would experience the greatest impact of an agroterrorism attack. An assault on agriculture would cause direct losses from containment measures and eradication of diseased animals, compensation paid to farmers for destruction of agricultural commodities, and a decrease in international trade as export partners impose protective embargoes.

Following years of warning punctuated by the September 11 terrorist attacks, the federal government has attempted to secure U.S. agriculture. Yet in its March 2005 report, the Government Accountability Office finds that these efforts fall short.

Reshaping government agencies to protect against agroterrorism

The legislative and executive branches have altered the roles of federal agencies with the objective of protecting U.S. agriculture from assault. The Homeland Security Act of 2002 established the Department of Homeland Security and charged the department with coordinating efforts to guard against agroterrorism. The Act also transferred most of the USDA's responsibility for conducting agricultural import inspections to DHS. In this way, the DHS should have the capability to recognize and prevent the entry of organisms that might be exploited for agroterrorism. Along with this shift of responsibility for preventing the introduction of plant or animal diseases, the DHS acquired the USDA's authority to inspect cargo manifests, international passengers, baggage and cargo, and to hold suspect articles for quarantine. The DHS also obtained most of the USDA's Plant Protection and Quarantine Unit inspectors.

The Bioterrorism Act of 2002 expanded the duties of the USDA and the Department of Health and Human Services for ensuring agriculture security. The departments gained responsibility for requiring companies, laboratories, and other entities to register materials that could pose a threat to agriculture and human health. The Act also required the USDA and HHS to develop an inventory of potentially dangerous agents and toxins that cause animal, plant, or human diseases. Individuals who possess or use these materials must register with the Secretary of Agriculture or HHS and submit to a back-

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An overview of United States Environmental Protection Agency air quality consent agreement for animal feeding operations

By David L. Cook, Matthew A. Cole, Curt Gooch, and Karl Czymmek

An earlier version of the article below was prepared to assist dairy farmer members of the Northeast Dairy Producers Association (NEDPA) evaluate potential participation in EPA's Air Quality Consent Agreement for Animal Feeding Operations. EPA announced an extension of the public comment period to May 1, 2005 and sign-up to July 1, 2005. The authors thank NEDPA for permission to share this document with AALA members.

In 2003, the National Academy of Sciences indicated that there is insufficient data to determine whether air emissions from dairy and livestock farms require compliance with the Clean Air Act ("CAA"), the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") or the Emergency Planning and Community Right-to-Know Act ("EPCRA"). Therefore the United States Environmental Protection Agency ("EPA") plans to develop methods for estimating the emissions of certain regulated air pollutants from dairy and livestock farms. EPA seeks to partner with animal agriculture to obtain accurate data so that sound, consistent methods to estimate the emissions from various sources found on farms can be employed. EPA wants to develop Emission Estimating Methodologies ("EEMs") to help both farmers and EPA make sure that farms are meeting existing air pollution control laws.

The Air Quality Consent Agreement ("Agreement") is one mechanism by which EPA can obtain the necessary data to develop the EEMs. The Agreement promises participating producers that they will not be the subject of environmental enforcement actions by the Federal Government for certain violations of existing laws protecting the environment. In return, the Agreement requires that participating producers pay a civil penalty and contribute a share toward funding an air emissions monitoring study. Participating producers must also be willing to allow collaborating scientists to use their farm site for measuring emissions, if selected.

Benefits to dairy producers from participation in the agreement

Dairy producers will have the opportunity for input in the collection of accurate emissions data from farms, and the development of regulatory requirements to help producers comply with applicable environmental laws. Without the agreement, data could be obtained and used with little or no input from the dairy industry. Partnering with EPA provides an opportunity to acquire meaningful and sound data resulting in a regulatory framework that is potentially more reflective of the needs of the dairy industry.

By signing the Agreement, EPA will provide a "covenant not to sue" to producers who may have unknowingly violated clean air laws. This covenant not to sue covers past emissions and will run through the period of the Agreement. Therefore unknowing violations of the laws discussed below which occurred before a dairy producer signed the Agreement will not subject that dairy producer to fines. While data collection efforts undertaken without the protections of the Agreement may assist dairy producers in their efforts to comply with the environmental laws in the future, such efforts will not offer any protection for past violations discovered by EPA after the EEM's are published. The Agreement provides the following protections to participating producers:

Clean Air Act - The CAA was developed to improve the nation's air quality because of increasing concerns about ozone deterioration, acid rain, smog, and the release of large quantities of hazardous substances into the air. Under the CAA state governments and the federal government work together to protect public health, welfare, and property from harm that can be caused by air pollution. The CAA provides permitting requirements that establish limits on the release of regulated air pollutants, require monitoring of the releases of those pollutants, and require the reduction of releases of those pollutants. 42 U.S.C.S. §§ 7401 *et seq.* (2005).

The CAA requires that producers obtain operating permits if emissions from their farms are greater than specified limits based on the overall air quality in their region. Title I, 42 U.S.C.S. §§ 7401 *et seq.* (2005); Title V, 42 U.S.C.S. §§ 7661 *et seq.* (2005). Penalties apply to producers who fail to obtain permits when required to do so. 42 U.S.C.S. § 7413 (2005).

The Agreement offers protection from fines for current and past violations of CAA permitting requirements, as described above.

Comprehensive Environmental Response, Compensation, and Liability Act - CERCLA, also known as Superfund, provides the Federal government with the power to deal with actual or threatened releases of hazardous substances. CERCLA provides for the clean up of hazardous waste sites and for the liability of those responsible for releases of hazardous substances. 42 U.S.C.S. §§ 9601 *et seq.* (2005). Releases of hazardous substances can occur as either emergencies (i.e. a tank failure) or on a continuous basis. A continuous release would be considered a regular and steady rate of emission from a barn or manure storage. CERCLA requires a producer to immediately notify the National Response Center when the producer knows that more than 100 pounds of ammonia or hydrogen sulfide has been released from their farm within any 24-hour period. 42 U.S.C.S. § 9603 (2005); 40 C.F.R. 302.4 (2005).

CERCLA also provides for high penalties if a producer fails to meet the notification requirements. The penalties are $25,000 or $75,000 per violation depending on whether the producer has failed to report violations in the past. 42 U.S.C.S. § 9609 (2005). Also, the fines can be cumulative for each day that a producer fails to report the release. *Id.* The Agreement offers protection from fines for current and past violations of the CERCLA hazardous substance release notification requirements for emissions of ammonia (NH_3) and hydrogen sulfide (H_2S) from animal agricultural barns and waste storage.

Emergency Planning and Community Right-To-Know Act - EPCRA addresses the environmental and safety hazards that arise from the storage and handling of toxic chemicals. EPCRA is designed to increase the public knowledge and access to information regarding toxic chemicals

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and to protect fire fighters, police officers, and emergency medical technicians that respond to emergencies at facilities that store toxic chemicals on-site. EPCRA's four major provisions address emergency planning, emergency release notifications, hazardous chemical storage reporting, and a toxic chemical release inventory. EPCRA requires that producers immediately notify the state and local emergency planning bodies for the areas or states likely to be affected if their farm emits more than 100 pounds of ammonia or hydrogen sulfide within a 24-hour period. 42 U.S.C.S. § 11004(a)(1) (2005); 40 C.F.R. 302.4 (2005). EPCRA requires this communication so the local community is properly notified if a release of ammonia or hydrogen sulfide occurs.

EPCRA provides for penalties of $25,000 for a first violation of the laws requirements and the penalty can be cumulative for each day that the violation continues. 42 U.S.C.S. § 11045(b) (2005). For a second or subsequent violation the penalty can be $75,000 which can also be cumulative for each day that the violation continues. *Id*. The Agreement offers protection from fines for current and past violations of EPCRA emergency notification requirements to report emissions of ammonia and hydrogen sulfide caused by agricultural wastes.

Additional requirements to maintain applicability of EPA covenants not to sue

If a dairy producer's operation qualifies as 10 times the large CAFO threshold (the operation houses more than 7,000 dairy cows or 10,000 dairy heifers), then within 120 days from receiving an executed copy of the Agreement back from EPA that producer must send written notice to the National Response Center that they raise cows that may generate ammonia in quantities above 100 pounds in a 24-hour period. The written notice must also contain a rough estimate of the releases, acknowledge participation in the monitoring study, and indicate the producer's intent to comply with release notification requirements at the end of the study. The same notification must also be provided to relevant state and local emergency response authorities.

At the end of the study and after the EEMs are published by EPA, participating producers must use the EEMs and certify to EPA that they are not subject to the requirements of the applicable environmental laws if emissions from their farms have not triggered CAA permitting requirements or CERCLA or EPCRA reporting requirements. This certification must occur within 60 days after EPA has published the applicable Emission Estimating Methodologies. The certification will not be required, at a minimum, for approximately three and one half years, or sometime during 2008.

Producers whose farms have emissions in excess of the thresholds stated under the Clean Air Act must also apply for and obtain applicable CAA permits, and if appropriate install Best Available Control Technology ("BACT") in an attainment area (locations where air quality is good) or technology meeting the Lowest Achievable Emission Rate ("LAER") in a non-attainment area (locations where air quality is not good, typically around large metropolitan areas). BACT and LAER are general categories for air emission mitigation techniques. The appropriate technique, if available, must be installed within 120 days after EPA has published applicable EEMs.

Additionally, all producers must report all releases of hydrogen sulfide and ammonia that trigger the reporting requirements of CERCLA or EPCRA. The report must be made within 120 days after EPA publishes applicable EEMs.

EPA's covenants not to sue under the Agreement covers past violations for individual emission units and violations that occur before the producer either submits the last required certification for an emission unit, or two years after the producer submits any required permit applications. The covenants not to sue end on the earlier of the two dates. The period of protection from the covenants not to sue could last as long as eight years. The Agreement's protection from fines for unknowing violations due to *past* emissions should be a powerful incentive to enter the Agreement for those dairy producers that believe the collection of emissions data will lead to increased scrutiny of emissions from their farms. It is important to remember that without the protections of the Agreement, any data collected could be used in actions against dairy operations for past emissions, even when those operations comply going forward.

Requirements for producer participation

Participating producers must pay a civil penalty based on the number of farms that they list on Attachment A of the Agreement. Even though producers must pay a civil penalty, signing the Agreement is not an acknowledgment of wrongdoing. The civil penalty provisions are included in the Agreement to provide a legal resolution between producers and EPA for possible past violations of the CAA, CERCLA, and EPCRA and allow the Agreement's protections to take effect.

When a producer is completing Attachment A of the Agreement, if two farms are on contiguous property then the farms should be listed as one farm. Any farms owned by a producer that are on non-contiguous parcels should be treated separately when completing Attachment A of the Agreement.

The amount of the assessed civil penalty can be calculated using the following guide:

$200 – If 1 Farm < 700 cows or 1,000 heifers.

$500 per farm - If 1 Farm > 700 cows or 1,000 heifers, but < 7,000 cows or 10,000 heifers or , if multiple farms < 7000 cows or 10,000 heifers.

$1,000 per farm – If 1+ Farm > 7000 cows or 10,000 heifers.

The assessed civil penalty will be due 30-days after the producer receives an executed copy of the agreement back from EPA. EPA will not sign the Agreement if they find that dairy industry participation is insufficient based on the funds needed to support an adequate monitoring program. Dairy industry representatives will need to work with scientists involved in the National Air Emissions Monitoring Study (NAEMS) to design the monitoring program and a producer committee under the auspices of the National Milk Producers Federation has been formed to explore this issue.

In addition to paying a civil penalty, participating producers are also required to contribute to the monitoring study fund. Funds will be paid by each producer who signs the Agreement. Alternatively, it is possible for other sponsor(s) to contribute all or some of the monitoring study fund although, thus far, no alternative sponsorship has been confirmed. Also the funds for the monitoring study will be delivered to an as yet unidentified US dairy industry entity and *not* to EPA. This entity will collect the money and turn it over to a non-profit board that has been set up to administer the NAEMS effort on behalf of animal agriculture. The monitoring study fund will provide the money necessary for independent scientists to collect data from dairy farms around the country. The data

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collected will be provided to EPA for their use to create the EEMs. Producers and/or the industry share financial responsibility to assure that the study is sufficiently funded.

Because the emissions from farms vary from region to region, the data collection should take place in several areas of the country. If the dairy industry decides against participation in the Agreement, EPA has indicated that EEMs will still be established for dairy source emissions based on the limited existing data, studies from other animal industries, or by acquiring data through other means. If a producer signs the Agreement, that producer is bound to participate in the study and contribute to the study fund, so long as EPA also signs the Agreement.

The amount that each producer must contribute to the monitoring fund is based on the number of farms that the producer lists on Attachment A of the Agreement and the number of farms of the same species that participate in the study. The actual amount each producer will be required to contribute per farm will not be known until sometime after the sign up period closes, now set for July 1, 2005. A producer cannot be required to contribute more than $2,500 to the study for each farm listed on Attachment A of the Agreement.

EPA has indicated that before the Agreement becomes effective and the study takes place certain minimum requirements should be met. EPA will enter into the Agreement if sufficient farms are monitored; discussions have centered around at least one farm each in the Northeast, Mid-west, West, and South. Many producers and organizations are justifiably concerned that enough farms are monitored to provide scientifically sound data. EPA indicates that additional farms can be monitored at the discretion and financial support of the dairy industry to improve the completeness of the EEMs.

A few participating producers will be required to allow the study to take place on their farms. Producers will be required to allow the scientists carrying out the study to enter their premises to decide whether that farm would be a good representative of other farms in the region. It is anticipated that the selection of farms will be a cooperative effort between the farm operator, local dairy industry leaders, the Principal Investigator and Project Director.

Important additional considerations

In addition to the threat of enforcement action dairy producers are also likely concerned with the threat of citizen suits. While signing the Agreement may prevent the ultimate success of a citizen suit against a participating producer, it will not prevent a citizen suit from being filed. EPA does not have the authority to prevent members of the community from filing citizen suits.

Also, dairy producers should be aware that signing the Agreement only protects participants from enforcement actions for civil violations of the environmental laws, it does not protect a participating producer from conduct considered criminal. For example, criminal penalties can apply if producers are aware of a release that must be reported and do not report or that their farms do not comply with applicable permitting requirements and do not obtain the necessary permits.

Additionally, even though EPA is offering limited covenants not to sue, it reserves the right to pursue legal action against farms that are believed to be imminently and substantially endangering human health, human welfare, or the environment. Furthermore, while signing the Agreement protects participants from enforcement of federal environmental laws it does not prevent a state from bringing an action for the violation of state environmental laws.

Beyond the above requirements, producers must also comply with the protocols used or the data developed during the monitoring study. Challenging the protocols will result in a loss of protection from suit.

It is important to note that it is possible that even if EPA signs the Agreement that EEMs for certain types of sources will not be able to be developed.

Finally, dairy producers should be cautioned that a significant addition to a farm after entering the Agreement could trigger permitting requirements. The CAA requires specific permits if the level of air emissions from a farm exceed the thresholds. If an increase in the size of a farm after entering the Agreement causes that farm's total air emissions to trigger permitting requirements, the Agreement's covenants not to sue will not cover producers who fail to obtain a permit for the addition. While this does not mean that a producer cannot increase the size of their farm at all, it does mean that producers should obtain the necessary permits if an expansion will cause emissions from their farm to exceed permitting requirements. There are no good estimates, at this time, of the size of an expansion that would trigger these requirements and it may be useful to work with state agencies to clarify the issue.

Summary and conclusion

EPA has indicated its need to regulate animal agriculture air emissions; however there is little data available for producers to determine if they need to comply with existing laws and for EPA to enforce those laws. Lawsuits against swine and poultry operations have proceeded even without good data from which to estimate emissions, and some of these farms have been forced to gather data at their own substantial expense. EPA has indicated that if dairy producers choose not to participate in the Agreement, then they will develop EEMs based on current data, emission data collected from other animal species, and/or by forcing individual dairy operations to monitor emissions at their own cost. None of these options are good for the dairy industry. Even though there continues to be concerns with the Agreement, the NEDPA Board of Directors has endorsed participation by individual farmers as a way for the dairy industry to proactively address environmental concerns of sustainable farming operations.

Participation in the agreement should be viewed as a type of insurance policy or as peace of mind during the duration of the Agreement. This is especially true for large farms that could be targeted by EPA for enforcement actions to prove to environmental groups that they are serious about the problem of emissions from animal feeding operations. The foregoing is not intended as an exhaustive analysis of the Agreement. All producers are encouraged to thoroughly review the Agreement. If producers have individual questions regarding participation they should seek competent legal counsel. Copies of the Agreement and other supporting information can be obtained at http://www.epa.gov/compliance/resources/agreements/caa/cafo-agr-0501.html. Producers have until July 1, 2005 to make a decision on the Agreement and file the appropriate paperwork with EPA. Materials relating to the Agreement including a timeline and flow chart for implementation can be found at www.prodairyfacilities.cornell.edu –click on "air emissions."

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forms. The proposed regulations also provide that, if the IRS determines that a withholding exemption certificate contains a materially incorrect statement or if an employee fails to provide an adequate response to a request for verification of the statements on a certificate, the IRS may issue a notice to the employer that specifies the maximum number of withholding exemptions the employee may claim. Employees who want to claim complete exemption from withholding or a number of withholding exemptions more than the maximum specified by the IRS must submit new withholding exemption certificates and written statements supporting their claims directly to the IRS. **T.D. 9196, 70 Fed. Reg. 19694 (April 14, 2005)**

KARNAL BUNT. The APHIS has

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ground check performed by the U.S. Attorney General.

The Bioterrorism Act of 2002 further authorized the USDA to conduct and support research into the development of an agricultural bioterrorism early warning system. Such a network would enhance coordination between state veterinary diagnostic laboratories, federal and state agricultural facilities, and public health agencies. To support these efforts, the USDA has the authority to coordinate with the intelligence community for evaluating information about potential threats to U.S. agriculture.

The President issued four directives that further define agencies' responsibilities in protecting agriculture. The directive most relevant to agriculture, Homeland Security Presidential Directive (HSPD)-9, establishes a national policy for defending the country's agriculture and food system against terrorist attacks and major disasters. Under the Directive, DHS serves as the lead agency responsible for ensuring the adequacy of federal, state, and local authorities in responding quickly to a terrorist attack. HSPD-9 also commands the DHS to oversee a national biological surveillance system that will help to differentiate between natural and intentional outbreaks. The Directive tasks the USDA and HHS with developing secure laboratories to enhance diagnostic capabilities for foreign animal and zoonotic diseases. If an agroterrorism attack should occur, then the DHS, USDA, HHS, and Environmental Protection Agency share responsibility for decontamination and stabilization of agricultural production.

Federal agencies have responded to this surge of responsibility and shifting authority. The FDA and USDA have been conducting vulnerability assessments to identify agricultural products most susceptible to terrorist attacks. The USDA and HHS have been forming laboratory networks to enhance diagnostic and monitoring capability. The USDA has established a committee to guide the development of a National Veterinary Stockpile. And the USDA created sixteen Area and Regional Emergency Coordinator positions to help states develop individual emergency response plans.

The GAO found serious shortcomings in these efforts.

Glitches in the system

According to the GAO, the United States still faces complex challenges that limit the ability to quickly and effectively respond to a widespread attack on livestock and poultry. One deficiency lies in the capability to detect such an attack. Many U.S. veterinarians lack the training required to recognize the signs of foreign animal diseases. Current regulations do not even require training in foreign animal disease for those most likely to be called upon if livestock were attacked: USDA-accredited veterinarians. The USDA has been considering a rule that would compel training in foreign animal diseases for accreditation, but the proposed requirement has been residing on a back burner for several years.

The GAO also expressed concern that the USDA uses diagnostic tests to characterize an outbreak at selected laboratories, not at the site of the outbreak. Experts consider on-site testing critical for speeding diagnosis, containing the disease, and minimizing the number of animals that must be slaughtered.

HSPD-9 requires federal and state agencies to develop a National Veterinary Stockpile that contains sufficient amounts of animal vaccines and other therapeutic products for responding to the most damaging animal diseases affecting human health and the economy. And the Directive demands that these therapeutics should be available within 24 hours of an outbreak. Yet the GAO found that vaccine supplies are limited; the USDA usually prefers to immediately slaughter diseased animals rather than vaccinate. The agency maintains vaccines for only one foreign animal infection: foot and mouth disease. Even these vaccines cannot be rapidly deployed, because they first need to be sent to the United Kingdom for bottling and testing.

The GAO also uncovered several management problems that reduce the effectiveness of routine efforts to protect against agroterrorism. Following the transfer of most USDA agricultural inspectors to DHS, agricultural inspections at ports of entry decreased, even though imports increased. DHS points to a large number of unfilled vacancies for agricultural inspectors, and plans to hire more than 500 inspectors by fiscal year 2006. Others have noted difficulties faced by former APHIS inspectors in the culture of the U.S. Customs and Border Protection service, as well as a lack of clarity about responsibilities shared by the USDA and Customs at U.S. ports.

The GAO's report suggests many changes that federal agencies could implement to address its concerns. However, the organization highlights two recommendations: the USDA should examine the costs and benefits of developing stockpiles of ready-to-use vaccines, and the DHS and the USDA should investigate the reasons for declining agricultural inspections.

Reinvention, not reshaping

Experts have voiced an overarching concern about the current system for ensuring the security of agriculture and the food supply—the dispersion of responsibility among the many federal and local organizations. This diffuse structure breeds the types of communications problems that the GAO discovered among federal agencies and between the federal and state governments.

In 2004, Peter Chalk of the Rand Corporation advised that safety measures should be standardized and streamlined within the framework of an integrated strategy that cuts across the responsibilities and capabilities of federal, state, and local agencies. "Integration of agriculture and food safety measures," he wrote, "would also serve to reduce jurisdictional conflicts and eliminate unnecessary duplication of effort."

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—Phillip B.C. Jones, Spokane, WA.
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adopted as final regulations that amend the Karnal bunt regulations to provide for the payment of compensation to custom harvesters for losses they incurred due to the requirement that their equipment be cleaned and disinfected after four counties in northern Texas were declared regulated areas for Karnal bunt during the 2000-2001 crop season. The interim regulations had also amended the regulations to provide for the payment of compensation to owners or lessees of other equipment that came into contact with karnal bunt-positive host crops in those counties and was required to be cleaned and disinfected during the 2000-2001 crop season.

These final regulations amend the interim rule to indicate that affected parties may apply for compensation whenever disinfection was required by an inspector and to extend the deadline by which claims for compensation must have been submitted. **70 Fed. Reg. 24297 (May 9, 2005).**

—Robert P. Achenbach, Jr., AALA Executive Director

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Agricultural Law Update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

From the Executive Director:

Membership Directory. The printed 2005 Membership directory has been sent to all members who had renewed their memberships by April 15. Several renewals and corrections have since come in and I will revise the directory in late May and put a PDF file of the revised directory on the AALA web site. Remember that the online directory is continually updated and is available in the "members only" section of the web site. Send me an e-mail if you have forgotten your username or password.

Annual Conference. President-elect Don Uchtmann is firming up the program for the 2005 Annual Agricultural Law Symposium on October 7 and 8, 2005 at the Country Club Plaza Marriott in Kansas City, MO. As soon as the program is substantially complete, I will post the information on the AALA web site. I am open to suggestions for tours or other outside activities in the KC area. If your firm would like to sponsor one of the food breaks, breakfasts, lunches, or the Friday evening reception, please let me know.

The AALA Board has chsen Savannah, GA as the location for the 2006 Symposium on October 13-14, 2006. This historic city will make a splendid environment for the seminars and a great place to bring the family.

Nominations for Annual Scholarship Awards. The Scholarship Awards Committee is seeking nominations of articles by professionals and students for consideration for the annual scholarship awards presented at the annual conference. Please contact Jesse Richardson, Associate Professor, Urban Affairs and Planning, Virginia Tech, Blacksburg, VA 24061-0113, (540) 231-7508 (phone) (540) 231-3367 (fax) email: jessej@vt.edu

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